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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

CARMEN VELAZQUEZ, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-55, precludes recipients of Legal Services Corporation funds from participating in "litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system," except that it allows representation of "an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." The question presented is whether that provision violates the First Amendment, or the text of the LSC Act (42 U.S.C. § 2996(6), and § 2996e(b)(3)), when it precludes a Legal Services lawyer from challenging the constitutionality or legality of a statute or regulation that bars a client from receiving a welfare benefit to which the client would otherwise be entitled.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 164 F.3d 757. The memorandum and order of the district court (Pet. App. 51a-101a) are reported at 985 F. Supp. 323.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on January 7, 1999. Timely petitions for rehearing filed by Legal Services Corporation and Carmen Velazquez, et al., were denied on July 8, 1999. On October 6, 1999, Carmen Velazquez, et al., and Legal Services Corporation, filed timely petitions for certiorari seeking review of aspects of the court of appeals' decision. On September 28, 1999, Justice Ginsburg granted the application of the United States to extend the time for filing a petition for a writ of certiorari to and including November 5, 1999. On October 27, 1999, Justice Ginsburg further extended the time of the United States to file a petition for a writ of certiorari to and including December 5, 1999 (a Sunday). The petition of the United States, to which this brief responds, was filed on December 6, 1999. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In 1974, Congress established the Legal Services Corporation (LSC), a quasi-independent, federally funded entity vested with responsibility to disburse federal funds designed to assure legal representation for the poor in civil cases. Aware that federally funded lawyers for the poor would, on occasion, be obliged to challenge one or another layer of government on behalf of their indigent clients, Congress self-consciously tailored the Legal Services

program to minimize the risk of government interference with the exercise of independent, zealously loyal legal representation. For example, Congress rejected the idea of a centrally controlled federal legal aid bureaucracy, opting instead to channel federal subsidies to a broad array of private, locally governed independent entities committed to providing excellent legal representation to the poor. Moreover, as the Solicitor General accurately notes, Congress, from the beginning, required legal representation by federally funded Legal Services lawyers to conform to the highest ethical standards of the profession. For the past quarter-century, the LSC Act has provided that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 42 U.S.C. § 2996(6). The Act also provides that LSC

> shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association. . . . The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities.

42 U.S.C. § 2996e(b)(3).

From 1974 to 1996, Congress assured that government-imposed practice restrictions on Legal Services lawyers did not collide with the statutorily mandated duty of zealous representation by explicitly providing for an ethical override

in connection with certain practice restrictions,[1] and by permitting supplemental private donations to be used to provide a full spectrum of legal representation when necessary. In 1996, Congress enacted the appropriations riders at issue in this case, significantly increasing the scope of practice restrictions imposed on Legal Services lawyers, and, for the first time, extending the practice limitations to privately funded representation. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321-55 (1996 Appropriations Act). Under the literal wording of the 1996 appropriations riders, Legal Services lawyers appeared to be absolutely barred from engaging in a wide range of lawyering tasks, even when the tasks were funded privately. *See* 1996 Appropriations Act, § 504(d)-(e). Under pressure from the courts, LSC, issued interpretive regulations purporting to construe the apparently absolute bans imposed by the appropriations riders as authorizing the provision of otherwise forbidden forms of privately funded legal representation by a Legal Services program, as long as the privately funded legal program is physically and programmatically separate from the legal program receiving federal funds. *See* 45 C.F.R. § 1610.

The petition of the United States in this case does not discuss the onerous restrictions placed on the use of private donations to LSC.[2] Rather, it seeks review of a decision by a

1. For example, the statutory ban on using LSC funds to influence agency or legislative action is subject to an explicit ethical override when necessary to represent an eligible client. *See* 42 U.S.C. § 2996f(a)(5).

2. A related petition for certiorari challenges the constitutionality of requiring local Legal Services programs to (Cont'd)

majority of the panel of the Second Circuit, written by Judge Pierre Leval, holding that Congress may not forbid federally funded Legal Services lawyers who are explicitly authorized to represent indigent clients seeking welfare benefits from challenging the constitutionality or legality of statutes or regulations that prevent such a client from receiving benefits. Judge Leval reasoned that although government possesses broad discretion in deciding what programs to fund, it may not exercise its funding power to permit only one viewpoint to be expressed, especially in the context of an adversary legal proceeding where the integrity of the judicial process depends upon the ability to present all available legal arguments to the court. In effect, noted Judge Leval, the restriction on challenging the constitutionality or legality of a welfare law allows a federally funded Legal Service lawyer to support the legal status quo, but forbids the lawyer to argue that the government-imposed status quo is unlawful or unconstitutional. Judge Leval held that such a restriction on the ability of a federally funded lawyer to advance a client's legal interests in court violates the First Amendment ban on government-imposed viewpoint discrimination. (Pet. App. 32a-35a.)

Judge Jacobs dissented, arguing that the power of government to decide what programs to fund necessarily includes the power to define the federally funded Legal Services program to include representation of indigent clients seeking welfare benefits under existing law but to exclude challenges to existing law as outside the defined program,

(Cont'd)

establish immensely wasteful and inefficient "physically separate" legal programs in order to use private funds to provide indigent clients with a full spectrum of legal representation. *See Velazquez v. Legal Servs. Corp.*, No. 99-604.

even when the existing law is allegedly unconstitutional. (Pet. App. 46a-48a.) Judge Jacobs' reasoning, adopted in large part by the United States in its petition, reduces First Amendment restrictions on government funding to a tautology, permitting government to respond semantically to virtually any First Amendment challenge to funding restrictions by characterizing them as the defining parameters of the government's program. Such a circular reasoning process trivializes the First Amendment. Under Judge Jacobs' reasoning, Congress could decide to forbid federally funded Legal Services lawyers from making any argument contrary to the wishes of the State, and defend the restriction as a valid exercise of judgment over the scope and definition of the governmentally funded program. If one thing is clear, however, in the otherwise murky relationship between restrictions on government funding and the First Amendment, it is that the government may not use its broad funding power to suppress a disfavored viewpoint, especially in the context of a judicial proceeding.

REASONS FOR DENYING THE WRIT

1. The petition for certiorari submitted by the United States in this case seriously misreads governing precedent. The United States reads *Rust v. Sullivan*, 500 U.S. 173 (1991), a 5-4 decision of dubious application to the instant question,[3]

3. Justice Souter cast the fifth vote in *Rust*. In his dissent in *National Endowment for the Arts v. Finley*, Justice Souter wrote that "outside of the contexts of government-as-buyer and government-as-speaker, we have held time and time again that Congress may not 'discriminate inviduously in its subsidies in such a way as to aim at the suppression of . . . ideas.' " 118 S. Ct. 2168, 2191 (1998) (*quoting Regan v. Taxation with Representation of*

(Cont'd)

so broadly that the case reduces First Amendment challenges to restrictions imposed by government funding statutes to a tautological process that trivializes the First Amendment. At the same time, the United States reads the more recent decision of the Court in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), which unanimously struck down a government effort to use the funding power to suppress a disfavored viewpoint, so narrowly that the decision is drained of virtually all precedential value.

In *Rust*, this Court upheld a restriction on the discussion of abortion by doctors employed in a government-funded family planning clinic. The *Rust* majority reasoned that, in the context of the family planning clinic program, the clinic doctor was really a spokesman for the government, and could, therefore, be confined to disseminating the government's desired message. *See* 500 U.S. at 192-94. Moreover, reasoned the *Rust* majority, the extremely narrow form of medical service provided by a family planning clinic doctor prevented the emergence of a "traditional" doctor-patient relationship that might well have been entitled to a greater degree of First Amendment protection. *See id.* at 200. Since the doctor in *Rust* was treated as the mouthpiece for the government, and since the doctor's interaction with a patient was deemed to be narrowly confined to a sliver of the "traditional" doctor-patient relationship, the *Rust* majority held that limiting the doctor's speech about abortion did not violate the First Amendment. *See id.*

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Wash., 461 U.S. 540, 548 (1983)). Similar to its support for the National Endowment for the Arts, the government neither speaks nor buys anything for itself through the funding it provides for LSC. *Cf. Finley*, 118 S. Ct. at 2190.

In *Rosenberger*, the University of Virginia subsidized a broad array of secular student publications, but declined to provide similar subsidies to religiously oriented publications. *See* 515 U.S. at 824-25. Virginia sought to defend its decision to subsidize secular but not religious speech by arguing that its subsidy "program" was self-consciously confined to speech about secular subjects, just as *Rust's* was confined to speech about family planning. *See id.* at 830-31. This Court rejected Virginia's effort in *Rosenberger* to define its subsidy program in an unconstitutional manner, holding that First Amendment limits on government funding restrictions cannot be reduced to a semantic tautology, especially in settings where the government is not the true speaker, but is subsidizing the speech-related activities of a broad array of private speakers. *See id.* at 834-35.

In this case, the United States is merely recycling Virginia's discredited arguments. The United States proceeds as though the government were the true "speaker" in this case, using Legal Services lawyers as spokespersons to convey a pre-selected government message, just as doctors were allegedly used in *Rust*. But, as in *Rosenberger*, the United States has elected to subsidize the speech-related activities of numerous private persons in order to enable poor litigants to oppose the government effectively in court. Unlike in *Rust*, lawyers who have been subsidized to permit them to assist indigent clients in challenging the government cannot plausibly be characterized as government mouthpieces parroting the government's line.

Similarly, the United States proceeds as though it is legitimate to subsidize pro-government speech, while withholding support from anti-government speech. One hopes that if Congress defined the Legal Services program

to encompass aid to indigent Democrats, but not indigent Republicans, the United States would recognize that the First Amendment places limits on the power of the government to "define" its subsidy program. The decision to subsidize a lawyers' speech if it defends the legal status quo, but to forbid a lawyer's speech that argues that the status quo is unconstitutional, is scarcely less offensive than the patently unlawful discrimination between Republicans and Democrats. In both settings, government is using its funding power to advance a favored political viewpoint and to retard a disfavored viewpoint.

The United States attempts to distinguish *Rosenberger* on the lame ground that courts may not be viewed as a limited public forum. (Pet. 19-21.) The cases it cites in support of this proposition demonstrate that the United States has failed to appreciate the crucial difference between permissible regulation of courtroom behavior and impermissible and unconstitutional restrictions upon the free flow of argument and information to the court. *Kelly v. Municipal Court*, 852 F. Supp. 724, 734-35 (S.D. Ind. 1994), *aff'd*, 97 F.3d 902 (7th Cir. 1996), and *Zal v. Steppe*, 968 F.2d 924, 932 (9th Cir. 1992) (Trott, J., concurring), cited by the Solicitor General in his brief, stand for nothing more remarkable than the proposition that a judge enjoys broad discretion to regulate in-court speech and conduct so that judicial business may be conducted efficiently and fairly. The ability to present legal argument to the court, implicated by the restrictions in the 1996 Act, is not subject to such broad regulation. The integrity of the judicial process relies upon freedom from government restrictions on the flow of information and argument to the court that are designed to favor one side in the adversary process. A court need not be characterized as a classic public forum to recognize that government efforts

to manipulate the permissible content of counsel's argument on the basis of viewpoint are utterly corrosive of a fair adversary process.

2. In the alternative, the decision of the Second Circuit is correct on statutory grounds because, properly construed, the interplay between the 1996 appropriations riders and the text of the LSC Act does not require Legal Services attorneys to refrain from contesting the constitutionality or legality of welfare laws in settings where such a betrayal of a client's interests would be ethically intolerable.

As the Solicitor General correctly notes in his petition (Pet. 6 n.2), the LSC Act mandates Legal Services attorneys to adhere to the highest ethical standards. *See* LSC Act, 42 U.S.C. § 2996(6) ("[A]ttorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession."); § 2996e(b)(3) (LSC "shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association. . . . [LSC] shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities."); § 2996f(a)(1) (LSC must "insure the maintenance of the highest quality of service and professional standards, the preservation of attorney-client relationships, and the protection of the integrity of the adversary process from any impairment in furnishing legal assistance to eligible clients."). An appropriations rider that explicitly permits a Legal Services lawyer to undertake the representation of an indigent client

but forbids the lawyer from advancing crucial legal arguments on behalf of that client is in clear tension with the text of the LSC Act that mandates compliance with ethical norms. It is possible, of course, to resolve the tension by reading the 1996 appropriations riders, which say nothing about ethical obligations, as impliedly repealing those provisions of the LSC statute that mandate compliance with the Canons of Ethics and the Code of Professional Responsibility. But such a misreading would violate this Court's well established rule that an appropriations rider should not be construed to repeal substantive statutory provisions by implication. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978); *see also* House Rule XXI(a)(i); Standing Rules of the Senate, Rule 16.2 (forbidding substantive amendments through appropriations riders). Rather, the practice restrictions imposed by the 1996 appropriations riders should be read in conjunction with an overriding command in the statutory text to act in accordance with ethical obligations.

Thus, in those settings where compliance with welfare practice restrictions described in the 1996 appropriations riders would result in a violation of the Canons of Ethics (for example, because adequate alternative counsel for an indigent client is unavailable), respect for the text of the LSC Act requires that Legal Services lawyers be permitted to act in accordance with the ethical precepts of the American legal profession without jeopardizing the funding of their legal programs.[4]

4. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-399 (1996). The ABA ethics opinion suggests that an LSC lawyer should, first, seek to comply with practice restrictions imposed by the appropriations riders by obtaining adequate alternative

(Cont'd)

3. Finally, the suggestion that Judge Leval's decision is in conflict with Justice White's opinion in *Legal Aid Society of Hawaii v. Legal Services Corporation*, 145 F.3d 1017 (9th Cir), *cert. denied*, 119 S. Ct. 539 (1998), is unpersuasive. The plaintiffs in that case attacked only the limitations imposed by the 1996 Appropriations Act on the use of private funds by Legal Services grantees; they disclaimed any challenge to restrictions imposed upon Legal Services attorneys who were paid out of federal funds. The instant suit raises this unaddressed issue. Accordingly, the Ninth Circuit did not squarely address the central issues raised by the petition for certiorari of the United States: the constitutionality of substantive limits placed on the ability of federally funded lawyers to advance crucial legal arguments on behalf of a client; and the possibility of a reading of the 1996 appropriations riders and the text of the LSC Act mandating compliance with ethical standards to recognize a narrow ethical override of the 1996 practice limitations when necessary to avoid a violation of the Canons of Ethics.

4. Thus, no need exists for Supreme Court review of the portion of Judge Leval's opinion that carefully and correctly interprets this Court's precedents and recognizes that government may not use the funding power to impose viewpoint based restrictions on the free flow of argument needed to assure the integrity of the judicial process.

(Cont'd)
counsel. When adequate alternative counsel is unavailable, the opinion acknowledges that, in the absence of an ethical override, a Legal Services lawyer would be placed in the untenable position of balancing the needs of a present client against the needs of future clients who would be harmed by a cut-off of funds. The ethics opinion makes clear that a client may never be asked to consent in advance to future representation that may prove inadequate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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